

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY NATHANIEL ALLEN,) No. C 11-4441 JSW (PR)
Petitioner,)
vs.) **ORDER TO FILE EXHIBITS OR
AMENDED PETITION; LIFTING
STAY; DENYING APPOINTMENT OF
COUNSEL; ADMINISTRATIVELY
REOPENING CASE**
G. D. LEWIS, Warden,)
Respondent.)
_____) (Docket No. 5)

INTRODUCTION

Petitioner, a prisoner of the State of California proceeding pro se, has filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 challenging the constitutionality of his state court conviction. The petition was stayed to allow petitioner to exhaust two claims in state court. Petitioner has filed a motion for appointment of counsel in which he states that he has now exhausted those two claims and wishes to proceed with the instant case. For the reasons discussed below, Petitioner is directed to file the exhibits referenced in his petition or an amended petition, the stay is LIFTED, the case is administratively reopened, and the motion for appointment of counsel is DENIED.

BACKGROUND

Petitioner was convicted in Alameda County Superior Court of first-degree murder with special circumstances and he was sentenced to prison for a term of life without

1 parole. In 2010, the California Court of Appeal affirmed the judgment on appeal, and the
 2 California Supreme Court denied a petition for review. Thereafter, petitioner filed a
 3 habeas petition in the California Supreme Court, which was pending when he filed the
 4 instant federal petition on September 7, 2011. The California Supreme Court denied the
 5 habeas petition in January 2012.¹

6 DISCUSSION

7 I Standard of Review

8 This court may entertain a petition for a writ of habeas corpus “in behalf of a
 9 person in custody pursuant to the judgment of a State court only on the ground that he is
 10 in custody in violation of the Constitution or laws or treaties of the United States.” 28
 11 U.S.C. § 2254(a). It shall “award the writ or issue an order directing the respondent to
 12 show cause why the writ should not be granted, unless it appears from the application that
 13 the applicant or person detained is not entitled thereto.” *Id.* § 2243.

14 II Legal Claims

15 Petitioner makes seven claims on his form petition by reference to purportedly
 16 attached exhibits. No exhibits were attached to his petition, however, so the Court cannot
 17 discern what all of his claims are meant to be. For example, a number of his claims are
 18 for a violation of his right to due process, but he states that his exhibits set forth how his
 19 right to due process was violated. Without the exhibits, it cannot be determined whether
 20 or not he states a cognizable claim for relief.

21 III. Motion for Appointment of Counsel

22 As Petitioner has presented his claims adequately and they are not particularly
 23 complex, the interests of justice do not require appointment of counsel at this stage of the
 24 case. Petitioner’s motion may, however, be renewed at a later stage of the case -- if, for
 25

26 ¹Good cause appearing, Petitioner’s failure to seek to reopen the instant case within 30
 27 days of the date the California Supreme Court denied his habeas petition is excused.

1 instance, an evidentiary hearing becomes necessary.

2 **CONCLUSION**

3 For the foregoing reasons and for good cause shown,

4 1. The motion for appointment of counsel (docket number 5) is DENIED.

5 2. Within *thirty (30) days of the date this order is filed*, Petitioner shall file the
6 exhibits referenced in his petition or an amended petition that sets forth cognizable
7 claims. The exhibits or amended petition must include the caption and civil case number
8 used in this order, No. C 11-4441 JSW (PR), and if the files an amended petition, it shall
9 include the words "COURT-ORDERED FIRST AMENDED PETITION" on the first
10 page. Also, because an amended petition completely replaces the original petition, *see*
11 *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992), Petitioner may not incorporate
12 into any amended petition material from the original petition by reference. Failure to file
13 the exhibits or an amended petition within the designated time and in accordance with
14 this order will result in the dismissal of this action without prejudice.

15 3. The stay is LIFTED. The Clerk shall administratively reopen the file.

16 IT IS SO ORDERED.

17 DATED: April 26, 2012


18 JEFFREY S. WHITE
19 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

TIMOTHY NATHANIEL ALLEN,

Case Number: CV11-04441 JSW

Plaintiff,

CERTIFICATE OF SERVICE

V.

GREG LEWIS et al,

Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 26, 2012, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Timothy Nathaniel Allen G-41162
SVSP
P.O. Box 1050
Soledad, CA 93960

Dated: April 26, 2012

Jennifer Ottolini
Richard W. Wiking, Clerk
By: Jennifer Ottolini, Deputy Clerk